IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

APPEAL NO.589 OF 1994

IN

SUIT NO.891 OF 1970

...

**Bomi Munchershaw Mistry of
Bombay residing at Maneck-Abad,
26-F, Nepean Sea Road,
Bombay- 400 036 ...Appellant
(Orig.Plaintiff)**

v/s.

1. Kesharwani Co.operative Housing Society Ltd.

2. Dadi Sorabji Mistry

**3. Adi Maneckshaw Cooper
Nos. 2 & 3 being the surviving Trustees of the Deed of Settlement dated 17th March, 1951**

4. Shernavaj Munchershaw Mistry

5. Geeta (Alias Dhun) Hiroo Chainani

6. Jasmine Bomi Mistry

**Nos.4, 5 & 6 residing at
Maneck -Abad, 26-F
Nepean Sea Road,
Bombay- 400 036 ...Respondents
(Orig.Defendants)**

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Mr.R.A.Dada, Senior Counsel with Mr.D.J.Khambatta, Mr.Zobair R. Dada, Mr.Misbhah R. Dada i/b M/s.Payne & Co. for the Appellant.

Mr.V.A.Thorat, Senior Counsel with Mr.Shailesh Shah, Mr.V.A.Sugdare, Ms.Javer Manniyar and Mr.Darshan Mehta i/b M/s.Dhru Liladhar & Co. for the Respondent No.1.

Mr.F.E.Devitre with Mr.Mohan Salian and Mr.Amit Deshpande i/b Gagrats for Respondents Nos. 2 & 3.

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CORAM: D.K.DESHMUKH &

J.H.BHATIA, JJ.

DATED: 22ND AUGUST,2007

JUDGMENT: (PER D.K.DESHMUKH,J.)

1. This Appeal arises from the judgment and decree dated 3-12-1992 passed in Suit No.981 of 1970 filed by the Appellant/Plaintiff. In the suit the Appellant-Plaintiff essentially sought enforcement of Height Restriction Covenant contained in the Conveyance dated 20th March, 1951 whereunder , according to the Appellant-Plaintiff, the conveyors (the owners of the adjoining plots of land) was restrained from building any structure in future

exceeding certain specified height on his land. By the judgment impugned in the Appeal the learned single Judge has decided most of the issues that arose in the suit in favour of the Appellant-Plaintiff, however, the learned single Judge has in the final decree restricted the operation of the height covenant to only a portion of the land and not the whole of it as contended by the Appellant/Plaintiff and has adopted an interpretation of the covenant which the learned single Judge himself observes is (i) that neither party has espoused atleast seriously. Present Appeal is, therefore limited to challenge to the restricted interpretation placed by the learned single Judge on the covenant limiting its applicability to only that part of the remaining land of the adjoining plot which was vacant as on the date of the conveyance i.e. 20th March, 1951 and not to the whole of it as contended by the Appellant-Plaintiff.

2. The facts that are material and relevant for deciding this Appeal are that one Ratanchand Hirachand was the owner of a fairly large property compromising land and structures thereon which property was acquired by him on 15-5-1947. Certain

parts and parcels of vacant land from out of this property were transferred under three different transactions dated 28-11-1947, 18-5-1949 and 27-4-1950. After transferring these lands, Ratanchand was left with 6350 sq.yards of land, which had structures on it. The structures included Ratan Villas Bungalow, which was occupied by the owner, servants' quarters, out-house, guest house, secretary house and garages. an area admeasuring 1000 sq.yards to the West and facing Arabian Sea was required to be kept open as per the Government covenant. By conveyance dated 20th March, 1951 an area admeasuring 565 sq.yards was conveyed by Ratanchand in favour of a private trust, which came into existence because of Indenture of Settlement dated 17th March, 1951. The trustees of this Trust were Munchershaw Mistry, Kekobad Mistry, Maneck Mistry and Khurshad Mistry.

3. The conveyance dated 20th March, 1951 contains various terms, important one being thus: Immediately after the preface comes the paragraph specifying that the vendor Ratanchand owns and possesses a piece or parcel of land or ground situated at Nepean Sea Road the full description whereof is given in the First Schedule which schedule forms a part of the

conveyance itself. Next, comes the mention of property pointed out by red-coloured boundary line in a plan annexed to the document and marked plan "A". This red marked portion is to be granted or intended to be granted. The price payable by the purchaser viz. the trustees on behalf of the trust is fixed at Rs.103/- per sq.yard. On actual measurement the area is found to measure 565 sq.yards, its total value being Rs.58,195/-. The purchasers are said to have paid to the vendor a sum of Rs.5000/- as earnest money on 26th October, 1950. The conveyance goes on to recite that for the consideration of Rs.58,195/- the vendor has agreed to convey to the purchaser the piece or parcel of land or ground described in the second schedule to the document and delineated on the plan marked "A". The purchasers together with their agents, workmen, servants etc. have been given the right to pass and re-pass from the central passage of the main gate as has been shown in the plan marked "B". This passage is marked in burnt-sienna in plan marked "B". The vendor covenants with the purchasers that he has good right, full power and absolute authority to effect the sale. The covenant as to title is followed by the crucial words in a certain setting. They read as under:-

> **"THE VENDOR DOTH HEREBY COVENANT WITH THE PURCHASERS THAT the Vendor, his heirs.... assigns and all persons.... claiming title from him shall, for all times, keep the space on the West of the land agreed to be sold and specified on the plan hereto annexed and marked "B" and thereon surrounded by a red-coloured boundary line unbuilt upon and open to sky AND FURTHER THAT THE VENDOR, his heirs... and assigns and all persons claiming title from him shall not build any structure at any time hereafter higher than the present existing garages on the remaining land of the Vendor nor any structure in front towards the south or on the central passage or in the garden in front of the property now known as RATNA VILLAS BUNGALOW as shown on the plan hereto annexed and marked "B" and thereon marked in burnt-sienna colour..."**

Then follow the covenants with the vendor promising to allow the purchasers passage through the central passage shown in burnt-sienna colour in plan "B", permitting the purchasers to erect a porch without pillars on the strip of land ten feet wide, and proposed to be kept open by the purchasers on the west of the land and also to build weather sheds not exceeding a certain height and width. The first schedule to the extent relevant is in these words:-

> **"ALL THAT piece or parcel of land admeasuring 6,933 square yards or thereabouts together with the messuages, tenements and buildings standing thereon... which said land and hereditaments and premises form part of a larger property and which larger portion is registered by the Collector of Land Revenue**

> under... New No.16989 C.R.R.7141 and New Survey Nos.1/7141 and 2/7141 and Cadastral Survey No.590 of Malabar and Cumballa Hill Division."

The Second Schedule, again to the extent relevant says:-

> "ALL THAT piece or parcel of land or ground admeasuring 565 square yards or thereabouts, forming part of the land described in the First Schedule..."

4. The Plaintiff is admittedly the beneficiary of the Trust. On the land purchased by the trust, a three storeyed building was constructed during the year 1954-55.

5. In August, 1966 a board was put up at the property that remained with Ratanchand proclaiming that the same was with the Defendant No.1-society. During the year 1967-68 the main Bungalow was being demolished by the Defendant No.1-society. It appears that the property that remained with Ratanchand was agreed to be sold to the Defendant No.1-society. Thereafter certain developments took place in relation to allowing of FSI-II, filing of Petition in this court challenging the same. All those developments have been narrated in detail in the judgment by the learned single Judge. But so far as

this Appeal is concerned, it is not necessary to narrate those developments again, suffice to say that the title in the property that remained with Ratanchand was transferred in favour of Defendant No.1-society. The present suit was filed by the Plaintiff for enforcing height covenant against the Defendant No.1-society. To this suit he had also joined the trustees of the trust which is the owner of the land as also the building standing on the land.

5. The suit was opposed mainly by the Defendant No.1-society. The trustees of the trust had also filed their written statement.

6. The principal defence of the Defendant No.1 society was that the height covenant is limited to the land under the garage and no more. The Defendant No.1-society had also sought rectification of the conveyance, because according to it the height covenant incorporated in the conveyance was a result of mutual mistake. On the basis of the pleadings filed by the parties, the learned single Judge framed following issues.

ISSUES

1. Whether the plaintiff has any locus standi to file and maintain the suit?

2. Whether defendants 2 to 4 did not take action to enforce covenants against the first defendant because of the bona-fide belief that the height restriction covenant pleaded by the Plaintiff related only to the land under the then existing garages?

3. Does Plaintiff establish that the height restriction clause appearing in the conveyance deed dated 20th March, 1951 covers the entire remaining property of the vendor Ratanchand, excluding that portion of the property which is shown in burnt Sienna and red colours in the plan accompanying the conveyance deed dated 20th march, 1951?

4. Whether defendant No.1 establishes:-

(a) that the height restriction covenant restricts construction of a structure on the existing garages and is limited to the land below the existing garages as shown in the plan?

(b) that the height restriction covenant is limited to land not built up on at the time of the conveyance.

5. (a)Was there an agreement dated 26-10-1950 between Ratanchand and Maneck Mistry (original Defendant No.3)?

(b) Did Maneck Mistry agree to purchase the Maneckabad property from Ratanchand as per the terms contained in the said agreement?

(c) Whether the aforesaid agreement of 26-10-1950 was adopted by the trust which trust came into existence by deed of settlement dated 17-3-1951?

(d) Was conveyance dated 20th March, 1951 executed pursuant to the aforesaid agreement?

(e) Was it the real intention of parties to conveyance dated 20th March, 1951 to give effect to the aforesaid agreement?

6. Whether the conduct of the plaintiff has been such as to constitute acquiescence, estoppel and/or waiver dis-entitling him from any of the reliefs claimed in the suit?

7. Has this Court jurisdiction to try the suit notwithstanding Section 94 of the Maharashtra Co.operative Societies Act, 19 60?

8. (a) Does plaintiff establish the ante-dating of the conveyance dated 31-3-1967 the conveyance having been really executed in November, 1967?

(b) If yes, what is the effect thereof?

9. (a) Are Zaveri and Lalchand necessary parties to the issue of alleged ante-dating of conveyance dated 31-3-1967?

(b) If so, effect?

10. Are the claims in suit within limitation?

11. (a) Is Plaintiff entitled to injunctions mandatory and prohibitory-claimed by him?

OR

(b) Is plaintiff not entitled to the afore-mentioned injunctions being guilty of gross laches, delay, waiver and estoppel?

(c) Whether the physical conditions of the area have so changed as to dis-entitle plaintiff from enforcing the reliefs claimed in the suit?

12. (a) Is the property conveyed to the first defendant divided from that conveyed to the trustees by a red line on the plan annexed to the conveyance and on the site by a wall built prior to 1967 by the trustees?

(b) If so, whether any property to the east of the boundary line has been conveyed to the first defendant?

13. Whether the declaratory relief claimed by Plaintiff is barred by the Proviso to Section 34 of the Specific relief Act, 1963?

14. (a) Whether the passage figuring in the suit has to be kept fully open and without allocation or reservation of parking space/recreating space by the first defendant?

OR

(b)Is the only restriction upon the first defendant that of keeping the same unbuilt upon and provide convenient ingress and egress?

15. (a) Does defendant No.1 establish that it entertained and acted upon a bona-fide belief about the height restriction covenant being limited to site under the existing garages?

(b) If so, whether enforcement of the height, restriction covenant as suggested by the plaintiff would work great hardship upon the first defendant?

(c) if (b) is answered in the affirmative, is Plaintiff not entitled to an injunction?

16. (a) Whether at all material times before the execution of the conveyance, the first defendant made it clear to G.G.Zaveri and Lalchand Hirachand that it was not interested in purchasing the property unless it was entitled to construction on the land a multi-storeyed building upto the available F.S.I. and that G.G.Zaveri and Lalchand Hirachand categorically assured first defendant that the property was suitable for such construction as alleged in para 21(i) of the written statement of the first defendant?

(b) Whether but for such an alleged assurance the defendant No.1 would not have entered into an agreement for purchase nor purchased the said property as alleged in para 21(i) of the

written statement of the first defendant?

17. (a) Whether the covenants sought to be enforced are covenants running with the land and therefore enforceable against defendant No.1?

(b) Did defendant 1 have notice of an alleged covenant restricting height restrictions on the entire remaining lands of the vendor?

18. Whether the height restriction covenants contained in the conveyance dated 20th March 1951 are unenforceable because of ambiguity and uncertainty?

19. (a) Whether trustees by word or inaction at all times induced defendant No.1 to believe that the height restriction covenant was limited to the site on which stood the existing garages?

(b) Does this disable Plaintiff from seeking to enforce the covenant?

20. Whether enforcing the height restriction covenant in the manner suggested by the plaintiff would confer an unfair advantage to him vis-a-vis the first defendant?

21. Whether enforcing the height restriction covenant in the manner suggested by the Plaintiff would lead to working of unforeseen hardship upon first defendant and no corresponding hardship on the Plaintiff as also the trust?

22. (a) Does defendant No.1 establish that damages would be an adequate relief to compensate plaintiff for infringements complained of?

(b) If so, is plaintiff not entitled to the mandatory and prohibitory injunctions claimed in the suit?

23. Whether the height restriction covenant is opposed to public policy as being an unreasonable fetter upon he provision of

housing?

24. (a) Is the height restriction covenant not registered as required by law?

(b) If so, is it enforceable as against defendant No.1?

25. Whether the alleged agreement dated 26-10-1950 stipulated a restriction in regard to height only in relation to the land under the then existing garages?

26. (a) Whether the stipulation in covenant Ex.B viz. "not to build any structure at any time hereafter higher than the present existing garages on the remaining land of the vendor... as shown in the plan hereto annexed and marked B was to give affect to agreed condition No.2 in alleged agreement dated 26-10-1950 i.e. not to "build upper storey on the existing garages" and parties neither intended nor agreed to burden the entire land of the Vendor?

(b) Whether in expressing the portions quoted defendant 1 establishes that there was a mutual mistake of parties to the conveyance dated 20-3-1951?

(c) Whether as the result of the alleged mutual mistake of the parties the second covenant in the conveyance dated 20th March, 1951 does not give effect to the real agreement and intention of the parties to the conveyance?

(d) If so, whether the said second covenant contained in conveyance requires to be rectified in the terms suggested by defendant No.1?

27. Is defendant 1's claim in regard to rectification within limitation?

28. Is defendant No.1 disabled from getting the relief of rectification for all or any of the reasons advanced by the plaintiff?

29. Is the claim for rectification untenable on account of non-joinder of Ratanchand Hirachand's legal representatives?

30. (a) Whether defendant No.1 establishes that parties to the conveyance never understood and/or interpreted the height restriction covenant in the manner suggested by the Plaintiff in the suit?

(b) Whether enforcing the covenant in the manner desired by the plaintiff would defeat the real intention of the parties and would impose uncontemplated hardship upon defendant No.1?

(c) If so, effect?

31. Relief and costs

<u>Additional issues</u>

M-I. Does defendant No.1 prove that the outhouse/guest house in the Ratna Villas compound was till late 1952/early 1953 a structure of ground and one upper floor only?

M-II. Does defendant No.1 prove that in late 1952/early 1953 an additional upper floor was put up by Ratanchand to the outhouse, raising its height to 40' inclusive of the sloping roof and 35' to 36' excluding the said sloping roof?

M-III(a) Was the trust and its then trustees in the facts mentioned in para 13(b (2) of defendant's written statement, aware of the addition of a floor and the consequential raising of the height of the outhouse?

(b) If so, effect?

7. The learned single Judge divided these issues under six heads. The first head was in relation to the locus of the Plaintiff to institute the suit for

seeking the relief which he was claiming in the suit. The second head related to the objection that the suit is bad for non-joinder of necessary parties, lack of jurisdiction and defect in the frame of the suit. The third head related to the objection as to limitation. The fourth head related to the issue dealing with the entitlement or disentitlement of the Plaintiff to the main relief linked with the height restriction covenant. The fifth head related to the construction of the height restriction covenant and the defence put up by the Defendant No.1 for rectification of the height covenant and the sixth head related to the minor reliefs.

8. Both the parties produced documents before the court. They also led oral evidence. The learned single Judge decided the suit by his judgment dated 3rd December, 1992. The learned single Judge decided the first head of issue relating to the locus-standi of the Plaintiff in favour of the Plaintiff and discussion regarding that is contained in paragraphs 42 to 52 of the judgment. The learned single Judge held that the Plaintiff has the locus-standi to maintain the suit. The second head relating to non-joinder, lack of jurisdiction and defect in the

frame of the suit is considered by the learned single Judge in paragraphs 53 to 55 of his judgment. The learned Judge held that the suit does not suffer from the non-joinder of necessary party, there can be no objection to the jurisdiction of the court and there is no defect in the frame of the suit. The third head in relation to the limitation is considered by the learned single Judge in paragraphs 56 to 60 of his judgment. The learned single Judge held that the suit of the Plaintiff is filed within the period of limitation. The fourth head relating to the entitlement or disentitlement of the Plaintiff to the main relief in relation to the height restriction covenant is considered by the learned single Judge in paragraphs 61 to 81 of his judgment. His conclusion is in paragraph 81, which reads as under:-

> **"81. To conclude in the entitlement disentitlement issue, not one factor goes against plaintiff. The normal rule of granting him the declaration and injunction to enforce the covenant will thus prevail."**

In so far as fifth head of issues regarding construction of the height covenant and the defence

of the Defendant No.1 that the conveyance is to be rectified in view of the mutual mistake is concerned, it is considered by the learned single Judge from paragraphs 82 to 125. The learned single Judge rejected the construction propounded of the height restriction covenant by the Defendant No.1. The learned single Judge rejected the defence of the Defendant No.1 for rectification of the height covenant because of mutual mistake. The learned single Judge also rejected the construction of the height restriction covenant propounded by the Plaintiff and the learned single Judge accepted that construction of the height restriction covenant which was not propounded by either party. The learned Judge held that the height restriction covenant which applies to remaining land provides that the structure of a height of more than 13 feet cannot be constructed on the land which was open on the date of the conveyance, which land has been described by the learned single Judge as bits and pieces. According to the learned single Judge these bits and pieces are the remaining land.

9. It is only the Plaintiff, who has filed an appeal challenging the judgment of the learned single Judge.

None of the Defendants have filed any appeal.

10. It may be pointed out here that initially a suit was filed in the city civil court by the Plaintiff on 27-3-1973 seeking declaration that the deed of conveyance dated 31st March, 1967 executed in favour of the Defendant No.1-society is void and an order for cancellation of the said deed on the ground that the said conveyance was ante dated with a view to defraud the revenue and such a document executed in contravention of the public policy liable to be cancelled. That suit was subsequently returned by the city civil court to the Plaintiff. It was presented in this court and was numbered as Suit No.942 of 1973. That suit was heard along with this suit (suit No.891 of 1970) and was decided by the learned Judge by order dated 3rd December, 1992 by passing following order.

> **"Declared that Ex.J. is inoperative and of no effect to the extent it expressly or by implication seeks to whittle down the rights, the owners and beneficiaries of Maneckabad (inclusive of plaintiff) have under Exh.B. Copies of the two conveyances to be annexed herewith. Defendants 1 and 2 shall pay the costs of the plaintiff. These defendants, as also the remaining ones, shall bear their own costs- those of the trustee-defendants 5 and 6**

> **to come out of the trust funds. Let a copy of that part of the judgment which deals with defendant 2's evasion of proper tax on capital gains, be sent to the Commissioner of Income Tax Bombay for such action as may be deemed necessary."**

11. The Defendant No.1-society and the vendors did not file any appeal against the decree passed in suit No.891 of 1970 as well as decree passed in suit No.942 of 1973. It appears that the legal representatives of the original vendor had filed an appeal being appeal No.170 of 1994 challenging the judgment and decree passed in Suit No.942 of 1973 to the limited extend. Even that appeal was withdrawn by them.

12. The present Appellant/Plaintiff had filed Appeal No.590 of 1994 challenging the order of the learned single Judge declining to cancel the Deed of Conveyance dated 31-3-1967 executed by the vendor in favour of Defendant No.1-society even after holding that the deed is ante-dated with a view to defraud the revenue. It appears that there were also cross-objections filed by the trustees in the Appeal filed by the legal representatives of the vendor. The Appeal filed by the Appellant and the

cross-objections were heard together by the Division Bench of this court. By judgment dated 29-6-2005, the Division Bench dismissed the Appeal and cross-objections and confirmed the order passed by the learned single Judge. In paragraph 14 of that judgment the Division Bench has observed that the Defendant No.1-society has accepted the decree passed in this suit. Defendant No.1-society has not filed any cross-objection has also not filed any affidavit in this Appeal indicating that it wants to challenge any of the findings recorded against it.

13. The learned Counsel appearing for the Appellant submitted that as all the other findings have been recorded by the learned single Judge in favour of the Plaintiff-Appellant, the limited challenge that is raised in the Appeal is restricted to the interpretation placed by the learned single Judge on the height covenant limiting its applicability to only that part of the remaining land of adjoining plots which was vacant on 20th March, 1951 and not to the whole of it as contended by the Plaintiff. It is submitted that the case of the Plaintiff-Appellant was and is that the height restriction covenant affected entire remaining land that is vacant as well

as built up. Defendant No.1's case before the learned single Judge was that the height restriction covenant operated only over the existing garages or that portion of the land on which the garages stood. Defendant No.1-society also made a claim for rectification of the covenant to that effect on the ground of mutual mistake. The learned single Judge rejected the Defendant No.1-society's case. The learned Judge has held that the height restriction covenant was applicable to the land which was not built upon and which was not part of the central passage garden and red lined portion to the west as shown in the map Exh.B to the Conveyance dated 20th March, 1951. In other words, the height restriction covenant applies to vacant bits and pieces of the land. The learned single Judge held that the covenant would restrict building on such vacant land to the height of the then existing garages. The learned single Judge himself has recognised the sequitur of such a construction, that it may be argued that such a construction would enable putting up of a structure over the existing garages, the very construction espoused by the Defendant No.1-society. It is submitted that the construction placed by the learned single Judge would also enable construction

(unfettered by the height covenant) on all portions of the land where buildings stood as on 20-3-1951. This would include the main Ratan Villa bungalow and the garages. It is submitted that the interpretation of the covenant espoused by the Plaintiff is borne out by (i) on plain reading of the covenant; (ii) description of the vendor's land contained in the covenant; (iii) the submission on behalf of the Defendant No.1-society that the Plaintiff was trying to take advantage of the words used in the conveyance in relation to the height restriction; (iv) statements made over a long period of time by the persons who were parties to the covenant. It is submitted that the learned single Judge himself has accepted that the word "land" included the structure standing upon the land. It is submitted that the finding recorded by the learned Judge that the word "land" sometime only means bare land in the Conveyance is clearly erroneous. It is submitted that the word "land" and the term "remaining land" appearing in the height covenant would include the land upon which the structures stand. It was submitted that the phrase "remaining land" found in the covenant would embrace land as well as built up land and height covenant would be applicable thereto

and not only cover vacant land. It is further submitted that the effect of the judgment of the learned single Judge is to add the words " which was vacant on 20th March, 1951" after the word "vendor". It is submitted that this is totally impermissible in law and would amount to the learned single Judge substituting the bargain actually made by the parties with a bargain which the learned single Judge would believe that the better have been made. More so the learned single Judge has held that there was no ambiguity. It is submitted that the learned judge was bound in law to give full effect to the height restriction covenant. It is further submitted that had that been the meaning of the covenant, the Defendant No.1 would have canvassed it. It is submitted that none of the parties to the covenant ever have even suggested that the height covenant applies only to the vacant land. It is submitted that the term "remaining land" in the height restriction covenant must necessarily be construed that which was retained by Ratanchand after the conveyance on 20th March, 1951 including such land on which structures were standing. The learned Counsel for the Appellant-Plaintiff took us through the entire evidence on record, both documentary and oral.

14. On behalf of the Defendant No.1/society it was contended that the height covenant which was described by the learned counsel for the first Defendant-society as garage covenant should be interpreted in the light of the letter dated 26-10-1950 addressed to Ratanchand by Maneck Mistry. It was submitted that the learned single Judge was not justified in refusing to rely on that letter for interpreting the height convent. The learned Counsel also referred to the opinion of Sir Jamshedji Kanga in support of his submission that the letter dated 26-10-1950 was a genuine document and that document has to be taken into consideration while interpreting the height covenant. The learned Counsel submits that the contemporaneous and proximate conduct of the parties to the conveyance dated 20th March, 1951 also establishes that the garage covenant only restricts construction above the garage and that the parties had neither intended nor agreed to impose a garage level height restriction on Ratanchand's entire remaining plot. It was further submitted that the language of the garage covenant should be construed with reference to the object of the parties and aim of the transaction and it will establish that the

garage covenant only restrains construction above the garages. A specific reference was made by the learned counsel to the oral evidence led by the Defendant No.1 society to show that in 1952-53 one floor was added by Ratanchand on the out-house to show that there was restriction only on construction on the garage.

15. Perusal of the judgment impugned in this Appeal shows that the learned single Judge has recorded findings in favour of the Appellant and against the Defendant No.1-society on almost all the issues. One finding that is recorded by the learned single Judge against the Plaintiff relates to the construction of the height covenant. In recording that finding the learned Judge has rejected the construction of the height covenant propounded by the Defendant No.1-society. Defendant No.1/society did not initially file any appeal againt the judgment, no cross-objection was also filed and an attempt was made by them to file cross-objections in the year 2005, but those cross-objections were dismissed by the Division Bench of this Court and challenge raised to that order before the Supreme Court has also admittedly failed. Thus, there is no cross-objection

filed by Defendant No.1-society. Admittedly, the Defendant No.1-society has not filed any appeal against the judgment of the learned single Judge. We have referred to the judgment of the Division bench in Appeal No.590 of 1994, to which the Defendant No.1-sopciety was a party. In paragraph 14 of that judgment the Division bench has observed "Both vendor and the purchaser-society have accepted the decree passed in Suit No.891 of 1970 as well as the decree passed in Suit No.942 of 1973. In paragraph 27 of that judgment, the Division Bench has noted a submission made to the following effect by the advocate appearing for the Defendant No.1-society "The society has accepted the decree passed in Suit No.891 of 1970 wherein it is declared that the part of the trust property wrongly included in the plan annexed to the deed Exhibit-J does not belong to the society." In paragraph 37 the Division bench has observed "Thus, the decree passed in both the aforesaid suits which have attained finality as far as the vendor and the purchaser are concerned, completely remove the cloud cast upon the Plaintiff's property". It is , thus, clear that so far as Defendant No.1-society is concerned, it has accepted the decree passed by the learned single Judge as

final. Because the Defendant No.1/society has not filed any appeal or any cross-objection, as held by the Supreme Court in its judgment in the case of Ravinder Kumar Sharma v/s. State of Assam and ors,AIR 1999 SC 3571, the Defendant No.1-society can, **without filing cross-objection attack an adverse finding for the purpose of sustaining the decree to the extent the learned single Judge had dismissed the suit against the Defendant No.1-society. In other words, without filing cross-objection the Defendant No.1-society can challenge such adverse finding recorded against it as may be necessary to support or sustain the decree that is passed by the learned Judge. Thus, the Defendant No.1-society can challenge the findings which have been recorded by the learned single Judge which are adverse to it only for the purpose of supporting the decree passed by the learned single Judge and also for contending that the learned single Judge was justified in holding that the height covenant does not extend to the entire remaining land, but it is restricted only to the bits and pieces of land which were vacant and open on the date of the conveyance. Therefore, so far as the contentions urged by the learned counsel appearing for the Defendant No.1- society in relation**

to the letter dated 26-10-1950 and the opinion of Sir Jamshedji Kanga are concerned, are totally irrelevant. Because, even if those documents are accepted at their face value, they will not support the construction put by the learned single Judge on the height covenant and the decree passed by the learned single Judge on the basis of that construction. If those documents are accepted at their face value as contended by the Defendant No.1, those documents would show that by the height covenant, the vendor was prohibited from raising any further construction on the garages or on the land on which the garages stood. Those documents, if accepted, would in fact go to show that the interpretation placed by the learned single Judge on the height covenant is wrong. The case of the Defendant No.1-society relating to the height covenant was that offer was made by one of the trusttes by letter dated 26-10-1950 to Ratanchand to purchase the land. In that letter it was stated that after a part of the land is sold to the trustee who had written the letter, on the garages standing on the land which will remain with Ratanchand further construction will not be made. According to the Defendant No.1-society this offer contained in the

letter dated 26-10-1950 was accepted by Ratanchand and pursuant to that the conveyance was executed in favour of the trust. Therefore, the height covenant in the conveyance should be read to mean that further construction on the garage is only prohibited.

. This case of the Defendant No.1-society is rejected by the learned single Judge by recording a finding against the Defendant No.1-society. Now by contending that this finding recorded by the learned Judge against the Defendant No.1-society is wrong, the Defendant No.1-society can not support the decree that is passed by the learned Judge. On the contrary, in case we agree with the Defendant No.1-society in this regard, we will have to set aside the decree passed by the learned Judge. Because the consequence of the decree passed by the learned Judge is that now further construction can be made on the garages and also on the land on which the garages were constructed without any restriction on the height of the construction. In our opinion, therefore, the submissions made by the learned counsel appearing for the Defendant No.1-society on the basis of the letter dated 26-10-1950 and the opinion of Sir Kanga have no relevance.

16. the other aspect urged by the learned counsel for the Defendant No.1, which would be relevant, is that according to him on the guest-house third floor was constructed by Ratanchand in the year 1952-53. The submission in that regard was that during the year 1952-53 Ratanchand constructed third floor on the guest-house. For that purpose he evicted the occupants, but neither the Plaintiff nor the trustees objected to the construction of the additional floor and therefore, an inference should be drawn that the height covenant found in the conveyance did not prohibit further construction on the existing building. Perusal of the judgment of the learned single Judge shows that this aspect of the matter has been considered by the learned Judge in paragraph 103 of the judgment. The learned Judge has referred to the evidence on record and has held that no such construction was made. We have been taken through the oral and documentary evidence on record. We see no reason to disturb the finding recorded by the learned Judge that no such event took place in the year 1952.

. For the sake of argument, even if it is accepted

that during the year 1952 Ratanchand constructed third floor on the guest-house, then also the purpose of the Defendant No.1-society will not be served unless they lead evidence to show that the trustees were aware of the ongoing construction during the relevant time and they did not raise any objection. No evidence was pointed out to us either oral or documentary which would establish that the trustees were aware of the alleged ongoing construction or that they did not raise any objection with Ratanchand, who was alleged to be, carrying on the construction. What is pertinent to be noted is, that there are no documents produced to show that any permission from the Planning Authority was secured by Ratanchand for carrying out the alleged construction nor is there any document produced to show that the ratable value of the building, where the alleged construction was made, was increased subsequent to the alleged construction.

. Thus, taking overall view of the matter, therefore, even the submissions made on behalf of the Defendant No.1-society in relation to the alleged increased of height of the guest-house also do not have any substance.

17. It is further to be seen here that on the basis of the letter dated 26-10-1950, it was contended by the Defendant No.1-society before the learned single Judge that the height covenant in the conveyance was a result of mutual mistake. This submission made on behalf of the Defendant No.1-society conceded the position that the height covenant included in the conveyance is not in the line with what is contained in the letter dated 26-10-1950. The plea for rectification of the conveyance because of mutual mistake has been rejected by the learned single Judge and there is no challenge to that finding.

18. Now, coming to the question whether the learned Judge was justified in construing the height covenant to mean that it restricts the height of construction only on the land which was vacant on the date of the conveyance, perusal of the judgment of the learned single Judge shows that the learned single Judge by referring to various parts of the conveyance has found that the term "land" has not been used in the conveyance in any one sense. At some places it has been used to denote the vacant land and at some places it denotes "land which has building standing

on it." Then the learned single Judge observes thus:

> **"Even so the words were specific. In any case words whether singular or where strung together with others, take colour from a context. The context here is a conveyance of about one-eighth of a property measuring 6933 sq.yds. The trustees acquired vacant land measuring 565 sq.yds. This left a balance of about 5785 sq.yds, though according to Ex.J, the balance was 5765 sq.yds. Therefrom the covenanted open land measured about 2100.00 sq.yds. The main bungalow and other structures occupied 1292 sq.yds. The remaining land may be in bits and pieces - measured a formidable 2373.00 sq.yds. The height covenant is applicable to these vacant bits and pieces. These bits and pieces are 'remaining land'. They belonged to the vendor Ratanchand. The evidence does not show that this entire vacant land was unbuildable according to building regulations. Limiting the height of structures on this vacant buildable land to the height of the then existing garages sounds quite reasonable. The space though large was already cluttered up with structures of different heights and widths. Construing the height covenant in this fashion does violence neither to language nor to the reason of the thing. What may go against this construction is that neither party has espoused it - at least seriously. That however is no reason for disregarding it when it fits into the scheme of things so well. Even the retention of the rate factor does not go against it for the vendor was getting a covenant on 10 ft. wide strip of Maneckabad land facing Ratan Villa. It may be argued that such a construction would enable putting up of a structure over the existing garages. That much a possibility exists is there, provided of course the building regulations do not go against it. This loss of a direct view of the sea would not be something unthinkable. After all some space to the west of Maneckabad had to be kept open to the sky and that space was considered enough to provide adequate light and air to**

> **those in Maneckabad. The interpretation also accords with Ex.B itself quite often equating 'land' with vacant land."**

It is, thus, clear that the learned single Judge has held that the term remaining land in the height covenant means the land which was actually vacant on the date on which the conveyance was executed. The principal reason that weighed with the learned single Judge, as is apparent from the judgment, in accepting this construction is that if the construction canvassed on behalf of the Plaintiff is accepted, it will means that while selling 565 sq.yards of land the vendor accepted the covenant, which renders the entire land left balance with him sterile. It appears that, according to the learned single judge, this could not have been the intention of the parties to the conveyance.

19. We have to scrutinise the impugned judgment and the record just to find out whether the learned single Judge was right in holding that the height restriction covenant was applicable only to the remaining vacant land and not to the structures which were already existing on the date of the execution of the conveyance deed.

20. Admittedly, on 20th March, 1950, the date of conveyance deed, there were number of structures within the premises known as Ratan Villa. Some of them were garages, guesthouses, servant's quarters and there was a big three storeyed bungalow having maximum height of about 70 feet. Taking into consideration the magnificent construction and its condition, it could be easily assumed that the said building could remain intact for a period of 50 years or more. There are a large number of old properties in Malbar Hill area, which are still in existence. Therefore, the life of that building was expected to be very long. It is next to impossible to believe that when the conveyance deed was executed, Ratanchand could have even anticipated that the building would be required to be demolished some day and after that he or his successors would be restricted from raising a building, with a height of more than 13-1/2 feet. Similarly, there were many other structures having ground + one floor or ground + two floors. Same logic would be applicable to them also. Therefore, it is difficult to believe that the parties had intended that the height restriction covenant would be applicable even to the land under

existing structures. By no stretch of imagination it can be assumed or believed that Ratanchand could have anticipated such interpretation of the covenant in the conveyance deed. Even though the learned single Judge held that Ratanchand was a astute businessman and must have knowing and willingly agreed to the height restriction covenant, and therefore, the height restriction covenant can be enforced, the learned single Judge observed that the interpretation put by the Plaintiff on the height restriction covenant was not ever intended or anticipated by Ratanchand. The learned single Judge observed as follows in paragraph 82 of his judgment:

> **"Between 1951 and 1959, there was no dispute between the parties to the transaction vis-a-vis the covenant. In 1959, to be precise on 12-9-1959, Manechershaw for self and trustees addressed Ex.A-1 to the BMC. The letter emphasised the height covenant as sought to be enforced by plaintiff.** This interpretation in its starkness came to the notice of Ratanchand."(emphasis supplied)

21. We find no reason to disagree with these

observations. It becomes clear that only when in 1959 Manchershaw, father of the Plaintiff, tried to grab the FSI of the remaining land of Ratan Villa by writing letter dated 12-9-1959 to the Municipal Corporation, Ratanchand must have come to know about the interpretation being put to the height restriction covenant and he could see the consequences of the interpretation put by the Plaintiff in all its starkness. Naturally, after that he tried to get certain clarification or to get the height restriction covenant relaxed by approaching Maneck Mistry, other trustees as well as the Plaintiff and for that several attempts were made.

22. It appears that one Gordhandas Punjabi intended to purchase the remaining property of Ratanchand in Ratan Villa and for that purpose an agreement for sale Exh.Soc-36 was executed. In Clause (4) of this agreement the vendor gave an assurance to the proposed purchaser to get a clarification/waiver vis-a-vis the operation of the covenant. This document was executed in August, 1962. It appears that in view of the clouds over the property in view of the interpretation of the covenant by the

Plaintiff, Gordhandas backed out from the agreement and thereafter an agreement Exh.A-3 took place with one Javeri. It also speaks about the covenant on the property. Javeri, who appeared to be broker, tried to contact some purchasers, but because of the covenant, nobody came forward.

23. It appears that in 1954 Ratanchand had filed Suit No.304 of 1954 against his children for partition of his property. In that suit, he filed affidavit Exh.D dated 20th October, 1965 and affidavit Exh.E-1 dt 5th November 1965. In the said affidavits also he stated that Ratan Villa was subject to restrictive covenant retarding development of property and there were also certain municipal restrictions about the development and, therefore, the value of the property was diminishing. Similar affidavit was filed by Lalchand, guardian-ad-litem for the minors in that suit. Even in the sale deed executed by Lalchand, as court receiver, in favour of the Defendant No.1, there is mention of the covenant, but also there is mention that attempt will be made to relax or waive the covenant. There was also correspondence between parties through their solicitors in 1965-66. The learned single Judge

rightly observed that there was no acceptance or admission by Ratanchand about such height restriction covenant either in affidavits or the correspondence. The record shows that till 1959, there was no dispute about the covenant. But after the letter of Manchershaw in 1959, there were clouds of this covenant on the property and this was reflected in different documents, affidavits and correspondence. That does not mean that Ratanchand had accepted the interpretation of the Plaintiff about the height restriction covenant and particularly about its applicability on the existing structures including his magnificent three storeyed 70 feet high bungalow.

24. It is contended on behalf of the Plaintiff that the Defendant No.1/society had tried to manipulate certain record and had also purchased the property with full knowledge of the covenant and therefore it can not plead any hardship on this count. It may be pointed out that Lalchand had filed a suit for recovery of unpaid price of the land against Defendant No.1 and in the written statement the Defendant No.1 had taken a plea that because of the restrictive covenant it was not in a position to make use of the complete land and that only 6900 sq.ft.

of land was actually available for construction and therefore, the price should be slashed to little more than Rs.2 lakh. Defendant No.1 had taken a plea that Lalchand had not taken sufficient steps to get the covenant relaxed. The learned single Judge rightly noted that, despite the plea, the Defendant No.1 had consented to a full decree with interest in favour of Lalchand. Even though on the basis of the written statement filed by the Defendant No.1 in that suit, it could be said that the Defendant No.1 was fully aware about the covenant, but fact remains that it has paid full agreed price of the land and therefore, it steps into the shoes of the vendor. Therefore, it is entitled to resist the claim of the Plaintiff that the height restriction covenant is applicable even to the land under the structures which were in existence in 1951.

25. It is argued before this court and was also argued before the learned single Judge that hardship is no ground not to give full effect to the covenant. The learned single Judge agreed and we also see no reason to disagree subject to the correct interpretation of the covenant. The Plaintiff can succeed on the basis of the rights he got under the

conveyance deed and nothing more. The learned single Judge has rightly noted that the word "land" has been used in different meanings at different places and the height restriction covenant is on the remaining vacant land. It is to be noted that total area of the land of Ratan Villa was 6933 sq.yards. After purchase of 565 sq.yards by the trustees, there was balance of about 5785 sq.yards. Out of this, main bungalow and other structures occupied only 1292 sq.yards, some land adjoining sea could not be used for construction due to municipal restriction and the remaining vacant land, which may be in bits and pieces, admeasures 2370 sq.yards. The learned single Judge noted that there is nothing to show that this remaining land is unbuildable according to Building Regulations, and therefore, on this land there may be height restriction covenant. The covenant for keeping certain land open and the height restriction covenant were to give sufficient air, light, passage and possibly also view of the sea, though it is not specifically mentioned in the conveyance deed. As per the plans, there is sufficient open space which is required to be kept open as per the covenant, between the property purchased by the Plaintiff and the garages situated towards the western side i.e.

towards the sea side. That space is sufficient to give air and light to the property of the Plaintiff. On the perusal of the plan-B, annexed with the conveyance deed Exh.B, one can see that in view of the open space towards the western side as well as the open space shown in burnt-sienna colour, sea view to some extent will be available to the property of the Plaintiff through the open space between the garages shown in the plan and main bungalow called Ratan Villa. Taking into consideration the small size of the property of the Plaintiff, he can not claim complete wide open view of the sea, which could be possible only if Ratan Villa is demolished and its height is brought down to the level of 13 & 1/2 feet. It is difficult to believe that the parties had ever intended that the Ratan Villa would be demolished just to give better sea view to the property purchased by the Plaintiff.

26. It is contended on behalf of the Plaintiff that if the Defendant No.1/society is allowed to make construction without any restriction on height, it may make construction of multi-storeyed tower which will increase the population in the area. It is contended that one of the intention behind the

covenant was that the area should not be over populated. In fact, there is no such reason given either in the letter dated 26-10-1950 written by Maneck Mistry or in the conveyance deed. What should be the population ratio for particular area and how much construction should be allowed is to be decided as per the Building Rules applicable. Admittedly, when this land was purchased and even thereafter, FSI available was 1.33. If the construction is made with prior sanction from the competent authority within the prescribed FSI, nobody can take objection to the same, unless somebody has a legal right to prevent the construction. It cannot be accepted that the Plaintiff who holds about 8% of the total land can be allowed to restrict the construction on the remaining 92% of the land of Ratan Villa. It will certainly cause hardship which could not have been even comprehended or imagined when the conveyance deed was executed. The learned single Judge observed as follows in paragraph 125 of his judgment:-

> **"There is rhetorical merit and no more in Plaintiff's contention that words used in a deed must be given full effect to regardless of the hardship and injustice it may lead to.**

Rules of construction are an aid to justice and justice does not lie in sustaining extreme stands."

27. It is contended on behalf of the Plaintiff that the learned single Judge has wrongly come to the conclusion that the height restriction covenant is applicable only to the remaining vacant land, while **in the conveyance deed the word** "vacant" is not **there. It is contended that it is not permissible for the court to introduce any word which is not there. It is contended that the land includes whole of the property including the structures on it and therefore, the learned single Judge could not hold that the covenant is applicable only to the remaining** vacant land.

28. In this regard reliance was placed by the learned senior counsel for the Appellant on the judgment of the House of Lords in the case of CHARTER REINSURANCE CO. LTD. AND FAGAN. In that judgment **the House of Lords refers to the observation of Lord Reid in Wickman Machine Tool Sales Ltd. v. Schuler A.G.(1974) A.C. 235, 251, the judgment which has been relied on by the learned single Judge. The**

House of Lords has held that the job of the court is to discover what the parties intended and what was the bargain between the parties. The court cannot substitute its own opinion because of some consideration and arrive at a conclusion which was not intended by the parties. Following observations from the judgment of House of Lords, in our opinion, are relevant:

> **"These arguments are fully explored in the judgments delivered below. Intending no disrespect I do not enter into them here, for in my opinion they cannot be decisive. If, as I believe, a proper reading of the policy discloses no condition precedent, there is little profit in considering whether it would have been absurd to include one. If, per contra, the words "actually paid" can only as a matter of language and context mean what the syndicates maintain, I would hesitate long before giving them any other meaning, just because the result would be extraordinary. The words of Lord Reid in Wickman Machine Tool Sales Ltd. v/s. Schuler A.G. (1974) A.C. 235, 251 do, of course, reflect not only a method of constructing contracts but also the common experience of how language is understood:**
>
> > "The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear."
> > **(emphasis supplied)**
>
> **This practical rule of thumb (if I may so**

> **describe it without disrespect) must however have its limits. There comes a point at which the court should remind itself that the task is to discover what the parties meant from what they have said, and that to force upon the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made. This is an illegitimate role for a court. Particularly in the field of commerce, where the parties need to know what they must do and what they can insist on not doing, it is essential for them to be confident that they can rely on the court to enforce their contract according to its terms. Certainly, if in the present case the result of finding a condition precedent would be anomalous there would be good reason for the court to look twice, and more than twice, at the words used to see whether they might bear some other meaning. In the end, however, the parties must be held to their bargain. Thus, if I had adhered to my first impression that the expression "actually paid" could possess, even in the context of the policy, only the meaning which it has in ordinary speech I would have wished to consider very carefully whether the opinion expressed in the dissenting judgment of Staughton L.J., austere as it might seem, ought to be preferred. In the event however, for the reasons stated, this is not my present understanding of the words, and since the broader question does not on this view arise I prefer to say no more about it."**

29. It is contended that the court can not substitute for the bargain actually made only because the court believes that it could have been made better. It is contended that if the parties so intended, they could have put the word "vacant" between the words "remaining land". It is difficult

to accept this contention. In the above referred authority it is also made clear that if a particular construction leads to very unreasonable result, it is unlikely that the parties could have intended it and if they so intended they could have made that intention abundantly clear. If the parties in the present case intended that the height restriction covenant is applicable even to the exiting structures, they could have specifically mentioned it in the conveyance deed. Taking into consideration these circumstances and the existence of a huge magnificent building with a height of 70 feet, it is difficult to belive that the parties ever intended that the height restriction covenant shall be applicable to the land under that structure also. In our opinion, as the parties had not intended such a restriction to be made applicable to the existing structures, there was no mention of the same in the conveyance deed. In fact, to hold that such a restriction is applicable to the area under existing structures, would amount to an addition of a covenant in the conveyance deed, which is not permissible.

30. The learned single Judge has minutely considered the evidence led by both the parties and their

arguments and came to the conclusion that the parties could not have intended to make a height restriction covenant applicable to the existing structures. We do not find any valid reason to disagree with this finding of the learned single Judge.

31. We do not find any merits in the Appeal and as a result the Appeal stands dismissed, with costs of the Respondent No.1/society, to be paid by the Appellant/Plaintiff.

(D.K.DESHMUKH, J.)

(J.H.BHATIA, J.)

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